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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Syllabi prepared by M. P. Burks, State Reporter.)

NORFOLK & WESTERN RAILROAD CO. v. CLARK.—Decided at Staunton, September 19, 1895.—*Harrison, J* :

1. APPEAL FROM JUDGMENT OF JUSTICE—*Matter in controversy—costs.* No appeal lies to the County Court from a judgment of a justice of the peace for \$10.00 and the costs. Costs are no part of the matter in controversy. *Sec. 2947 of the Code, as amended by Act of March 1, 1894.*

THOMAS V. STUART'S EXOR. AND OTHERS.—Decided at Wytheville, July 18, 1895.—*Harrison, J* :

1. CONVEYANCE BY HUSBAND AND WIFE—*Acknowledgment—error in recording, how shown and corrected.* A deed duly signed and acknowledged by a husband and wife, and properly certified as to each of them, and delivered to the clerk of the court of the proper county to be admitted to record as to the husband as well as the wife, operated to convey from the wife all her estate of every nature in the property conveyed by such deed, notwithstanding the fact that the clerk, through inadvertence, may have omitted to properly record the acknowledgment. The error in the recordation may be shown by the production of the original deed with the certificates of acknowledgment thereto attached. The deed, being good between the parties, may be again admitted to record on the old acknowledgment, and thus correct the error in the former recordation.

STUART V. PENNIS.—Decided at Wytheville, July 18, 1895.—*Riely, J* :

1. CHANCERY JURISDICTION — *Specific performance — growing trees.* Growing trees constitute a part of the soil, and a contract in writing for the sale of them will be specifically enforced by a court of equity. But even if they were deemed personalty, a court of equity would entertain a bill for specific execution of a contract for their sale, because the remedy at law is inadequate and incomplete.

NORFOLK & WESTERN RAILROAD CO. v. DE BOARD'S ADMR.—Decided at Wytheville, July 18, 1895.—*Cardwell, J* :

LICENSEE—*Footpath.* One who, either alone or in common with the public, has for a long time used a footpath over the lands of another, with his knowledge and without objection, is a licensee. But whether a designated person is a licensee or not is a question of fact for the jury.

2. LICENSEE—*Land-owner—repairs to footpath—undermining footpath.* The owner of land over which is a footpath owes no duty to a licensee to keep said footpath in good order or repair; but if such owner carelessly and negligently makes an excavation beneath said footpath, not open to common observation of persons passing along the same, and not apparent to one exercising ordinary care, and knowing the said footpath to be in a dangerous condition, fails to repair the same, or to give notice or warning thereof to such licensee, and personal injury results therefrom to the licensee without negligence on his part, the owner is liable in damages for such injury.

3. LICENSEE—*Land-owner—undermining footpath—measure of damages.* In an action by the personal representative of a licensee of a footpath for causing the death of such licensee, by carelessly and negligently undermining said footpath, the measure of damages is such sum as to the jury may seem fair and just under all the circumstances of the case, not exceeding the amount claimed in the declaration.

PETER J. OTEY AND WIFE AND ANOTHER V. STUART AND OTHERS.

Decided at Wytheville, July 18, 1895.—*Buchanan, J.*:

1. CHANCERY JURISDICTION—*Cloud on title—legal owner out of possession—adequate remedy at law.* A party holding the legal title to land, and who is not in possession thereof, has a complete and adequate remedy at law to recover possession, and, as a general rule, in the absence of statutory authority, a court of equity will not entertain a bill filed by him to remove a cloud upon the title occasioned by such possession in another under a claim of title.

WATKINS V. WEST WYTHEVILLE LAND & IMPROVEMENT CO.—De-

cided at Wytheville, July 25, 1895.—*Harrison, J.*:

1. CONTRACTS—*Misrepresentation—rescission—damages—set-off under section 3299 of the Code.* A party claiming to have been damaged by fraud or misrepresentation in the procurement of a contract for the sale or purchase of real estate may elect to rescind the contract, or may proceed at law to recover damages. If sued at law on bonds given for deferred payment of purchase money, he may file a special plea under section 3299 of the Code, and have set-off against the plaintiff's demand the amount of damages sustained by him in consequence of such fraud or misrepresentations.

2. CONTRACTS—*Misrepresentations of fact—opinion.* A misrepresentation, the falsity of which will afford a ground of action for damages, must be of an existing fact. It must be an affirmative statement of some fact in contradistinction to a mere expression of opinion. A representation that certain enumerated improvements will be made is the mere expression of an opinion, and the failure to make such improvements constitutes no defense to an action on a contract induced by such representations.